

## Comptroller of the Currency, Treasury

## § 165.2

### **§ 165.1 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.**

(a) *Authority.* This part is issued by the OCC pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this part is to define, for Federal savings associations, the capital measures and capital levels that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This part also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This part implements the provisions of section 38 of the FDI Act as they apply to Federal savings associations. Certain of these provisions also apply to officers, directors and employees of Federal savings associations. Other provisions apply to any company that controls a Federal savings association and to the affiliates of a Federal savings association.

(d) *Other supervisory authority.* Neither section 38 nor this part in any way limits the authority of the OCC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OCC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a Federal savings association under this part within a particular capital category is for purposes of implementing and applying the pro-

visions of section 38. Unless permitted by the OCC or otherwise required by law, no Federal savings association may state in any advertisement or promotional material its capital category under this subpart or that the OCC or any other Federal banking agency has assigned the Federal savings association to a particular category.

### **§ 165.2 Definitions.**

For purposes of this part, except as modified in this section or unless the context otherwise requires, the terms used in this part have the same meanings as set forth in sections 38 and 3 of the FDI Act.

(a)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term “controlled” shall be construed consistently with the term “control.”

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate Federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with part 167 of this chapter.

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or

individual for the provision of management services or advice to the Federal savings association or related overhead expenses, including payments related to supervisory, executive, managerial or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the Federal savings association.

(e) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(f) *Tangible equity* means the amount of a Federal savings association's core capital as computed in part 167 of this chapter plus the amount of its outstanding cumulative perpetual preferred stock (including related surplus), minus intangible assets as defined in §167.1 of this chapter, except mortgage servicing assets to the extent they are includable under §167.12. Non-mortgage servicing assets that have not been previously deducted in calculating core capital are deducted.

(g) *Tier 1 capital* means the amount of core capital as defined in part 167 of this chapter.

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(i) *Total assets*, for purposes of §165.4(b)(5), means adjusted total assets as calculated in accordance with part 167 of this chapter, minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of total capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

**§ 165.3 Notice of capital category.**

(a) *Effective date of determination of capital category.* A Federal savings association shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the savings association is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A Federal savings association shall be deemed to have been notified of its cap-

ital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition (Call Report) or Thrift Financial Report (TFR), as appropriate, is required to be filed with the OCC;

(2) A final report of examination is delivered to the savings association; or

(3) Written notice is provided by the OCC to the savings association of its capital category for purposes of section 38 of the FDI Act and this part or that the savings association's capital category has changed as provided in paragraph (c) of this section or §165.4(c).

(c) *Adjustments to reported capital levels and category*—(1) *Notice of adjustment by Federal savings association.* A Federal savings association shall provide the OCC with written notice that an adjustment to the savings association's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the savings association to be placed in a lower capital category from the category assigned to the savings association for purposes of section 38 and this part on the basis of the savings association's most recent Call Report or TFR, as appropriate, or report of examination.

(2) *Determination by the OCC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OCC shall determine whether to change the capital category of the Federal savings association and shall notify the savings association of the OCC determination.

**§ 165.4 Capital measures and capital category definitions.**

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this part, a Federal savings association shall be deemed to be:

(1) *Well capitalized* if the savings association:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and